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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 35977

71 - 289

ESTATE OF ESTHER ZAHN,

Deceased.

MARGARET ZAHN, PAUL ZAHN
and OTTO ZAHN,

Plaintiffs and Appellants,

vs.

SECURITY PACIFIC NATIONAL BANK,
Executor, THE SALVATION ARMY,
and THE STATE OF CALIFORNIA,

Defendants and Respondents.

RESPONSE OF THE SALVATION ARMY TO THE PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LACK OF SPECIAL OR IMPORTANT REASONS.

The thrust of this petition is that the holographic will of the decedent contained "restrictive covenants." This inaccurate legal language is designed to attract the attention of this Court, causing it to believe that there may have been some violation of the Constitution of the United States. There was no violation. This will be demonstrated by the following analysis of this petition and the opinion of the California Court of Appeal.

The petitioners propose ten questions which they asserted would be presented to this Court. (See pages 9 to 11.) These ten (10) points may be simply condensed into the following three (3) questions:

1. Did the Will contain "restrictive covenants"? (Questions 1, 2, 3, 4, and 5.)

2. Did the Will and evidence adduced at the trial show a general charitable intent: (Question 7) ?

3. Was the cy pres doctrine applicable? (Questions 3, 4, 5, 6, 9, 10.)

All of these points have been considered by the California Courts and their opinion was expressed by Justice Jefferson of the California Court of Appeal. (See Appendix A to the Petition for Certiorari.)

THE RESTRICTIVE COVENANTS

On the question of the mislabeled "restrictive covenants" the Court of Appeal said:

> "Neither the Will nor the Decree forbids, restricts, or limits the use of the property to Christian women or students, nor is there anything in the record to indicate that it is in the intention of the Salvation Army to do so." (See Appendix page 13.)

The court later said:

> "Its decree provides in pertinent part, 'The Salvation Army or any other trustee is directed to seek out and give . . . preference to those woman and girls who fit the description set forth hereinabove. If the classification of beneficiaries proves to be too restrictive, then the trustee should seek further instructions from the court.' . . . ." (See page 14 of the Appendix.)

The petitioners' assertion that there is a restrictive use of the decedent's property is erroneous, not founded on any fact, nor do petitioners point to any portion of the record that would sustain their contention. It is devoid of merit.

THE GENERAL CHARITABLE INTENT

On the question of whether the Will and the evidence adduced at the trial showed a general charitable intent by the testatrix, the Court of Appeal said:

> "The record is replete with evidence and testimony extrinsic to the will which supports the trial court's finding that the testatrix demonstrated a general charitable intention in establishing these gifts. The fact that the . . . [testatrix] may have been motivated by a desire to perpetuate the memory of named persons does not necessarily destroy the charitable character of the bequest . . . . ." (See Appendix page 9.)

The petitioners' contention that "the will was non-charitable on its face" (Petition page 2) and that, "It (the California courts) arbitrarily and capriciously took the property and gave it to the Salvation Army. . . ." (see Petition page 3) is without merit.

THE CY PRES DOCTRINE

On the question of whether the cy pres doctrine was applicable, the Court of Appeal said:

"Appellant's first three assignments of error involve the same issue: Were the gifts of the Flower Street and Keniston Street residence and the assets designated for use incidental thereto, specific gifts which were adeemed, or does the doctrine of cy pres apply to preserve the testatrix' charitable intentions and prevent these assets from passing intestate with the residue?"

The Court of Appeal in deciding this question said:

"Appellants argue on the ground that the restriction on the use of the testatrix' property is invalid and renders the charitable bequest void or lapsed. Civil Section 2279, however, has no application to the present case. The rule of cy pres is one of construction, the object of which is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter -- the trust will not fail but the Court will direct the application of of the property to some charitable purpose which falls within the charitable intention of the settlor."

The petitioners have consistently contended that the cy pres doctrine does not apply in California since there is no express statutory

enactment. (See Petition page 14.) However, this common law doctrine has been applied in California since 1881. (See Estate of Hinchley, 58 Cal. 457 at 512.)

THE EVANS CASE

The petitioner previously urged and argued the case of Evans v. Abney, 396 U.S. 435, 24 L. Ed. 2d 634, before the Court of Appeal which rejected the petitioners' interpretation and application of that case to the case at bench. (See Appendix page 11.)

CONCLUSION

The Petition for a Writ of Certiorari does not present any constitutional question for this Court's consideration. It is respectfully urged that the petition should be denied.

Respectfully submitted,

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PETITION FOR REHEARING

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